"SEC. 2899. No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs until the same has been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector, may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall, in either case, be forfeited.

"SEC. 2901. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be shall be, liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended.

"SEC. 2939. The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined.

The bond was in the sum of fifty thousand dollars, and conditioned as follows:

"The condition of this obligation is such that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents and delivered from the custody of the officers of the customs in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined, have been appraised and reported to him, be returned to the order of the collector without having been

opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs; or if the above-bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void, otherwise to remain in full force and virtue.

"And the above-bounden obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall indorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and indorsed as aforesaid; and that the value of the importation, where there is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof."

Upon the facts stated the question is, How much, if anything, can the Government recover upon this bond? That there is difficulty in the solution of the question is found in the different suggestions put forward; that the actual damages sustained by the Government may be recovered, which is the contention of the respondents, and was the view of a majority of the Circuit Court of Appeals; second, the actual value of the unreturned package, which was the view sustained by one judge of the Circuit Court of Appeals; third, twice the value of the package not returned, which was the view of the Circuit Court; fourth, double the value of the consignment, which seems to be the present contention of the Government.

It may be admitted that the bond does not follow in strict terms the provisions of section 2899, which seems to require, or at least to authorize, a bond in double the estimated value of the merchandise imported, with a condition that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. The statute further provides that if in the meantime any package should be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond; in either case it shall be forfeited. The bond given, while it was for a period of six months, in the sum of $50,000, provided that the collector of customs should indorse on the bond the estimated value of each importation and the date thereof, and that the penalty of the bond should be double the value of each importation as so made and indorsed, which in this case would make the penalty $3,044. This bond contains the condition that if the obligors, in lieu of the return of the package, pay to the proper collecting officer double the value of the package or packages not so returned then the obligation is to be void.

While the statute does not provide in express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter to the statute and is neither *malum prohibitum* nor *malum in se*, it is a valid bond, although not in terms directly required by the statute. (*Moses* v. *United States*, 166 U. S. 571, 586.) Indeed the learned counsel for respondents concedes that such a bond can be taken, and in his brief says: "Respondents make no point as to the conformity of the bond to the statute, or the right of the United States or the collector to enforce it in its form as made. For the purposes of this argument we concede that it was a voluntary bond, enforceable according to its terms, and that there has been a breach."

But we think this something more than a mere voluntary bond. The statute authorizes, it is true, a more stringent undertaking, for literally it authorizes a bond in double the value of the merchandise, conditioned that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. And further provides that if, in the meantime, any package shall be opened, except in the presence of the collector in the in the manner provided, or if the package is not delivered to the order of the collector, according to the condition of the bond, it shall in either case be forfeited. With this ample authority to take a more enlarged undertaking we think it was within the power of the collector to take the bond in suit, which, taken together, provides for the return of any required package in an unopened condition or the payment of double its value as a condition of being discharged from the full penalty of the bond. There is nothing in this bond which runs counter to the statute, and it is within the authority conferred to take a bond which should be forfeited if the package was not returned in the manner required. Certainly the makers of the bond cannot complain that they have been permitted, by its terms, to discharge the obligation to return a package by paying double its value, when a bond in double the value of the merchandise to be forfeited for the non-return of a package unopened might have been required.

The real question in the case, then, is what, if anything, can be recovered under the circumstances shown, on the obligation incurred in this bond? It is the contention of the respondents that the United States can recover only for actual damages which it has shown that it sustained, and that it was not the purpose of the statute or the obligation of the bond given to enlarge the liability beyond such damages as the Government shall be able to allege and prove. But we think the purpose of the statute and the purpose of the requirement in the bond provided for therein, and the one given in this case, was to secure the performance of the duty imposed of returning the package or packages, where an importer availed

himself of the privilege of withdrawing merchandise from the custody of the Governmental officials before it has been examined and appraised. It is the right of the Government to examine merchandise imported from foreign countries and ascertain its value for the purpose of fixing the amount of duties collectible thereon. It has the right to hold this merchandise until this purpose can be effected. Obviously, in a country where the business of importing goods has become so vast, as is now the case in United States, it would be impracticable to store all goods and hold them until examination. The law has, therefore, provided for the detention usually of one package in ten of an importation, and given the privilege to the importer of removing the rest of the goods, but to be held intact subject to the right of the Government, if an examination of the packages ordered for inspection shall suggest such course, to require that other packages be returned intact for examination, and if this statutory duty is not performed, we think it was the intention of the law to provide specific damages to be recovered upon the nonperformance of the duty imposed, and to secure a prompt and faithful discharge of which the statute provides for the giving of a bond.

In carrying out this purpose we hold the law permitted the taking of such a bond as was given in this case, providing that if the party did not return the package required he should pay double the amount of the value thereof. We think such undertaking, for this manner of discharging this duty, or paying the value stipulated, was intended to and does relieve the Government from the necessity of showing any actual damage or loss. It is suggested that the Government may prove the damages sustained possibly by the testimony of informers or of those who packed the merchandise before shipment, and in other ways. But in our opinion it was the purpose of this statute, and the bond executed in the case, to dispense with the necessity of resort to this method of showing damages and to fix double the value of the package ordered to be returned, as a definite sum to be paid for the nonfulfillment of the statutory duty. In such cases the recovery is for the the stipulated sum, and is not limited to the damages actually proven. (*Clark* v. *Barnard*, 108 U. S. 436, 457.)

It is strongly urged that this in many cases may work serious hardship, and that in all the years in which this statute or its equivalent has been in force no action is shown to have been brought upon this theory. But the contract is definite in its terms, and it was the privilege of the importer to leave the goods in the custody of the Government or take them out upon giving the obligation which is the subject-matter of this suit. It may be that in some cases such a rule would permit the Government to recover a large percentage of the value of the goods imported, and it is suggested the package not returned may represent the larger part of the value of the

entire invoice, but we do not think these considerations should overcome the purposes of the statute and the terms of the obligation incurred in the giving of this bond.

The purpose of the statute was to enforce the collection of the revenues, and to require that goods shall be as represented, and if removed from governmental control before the facts about them are ascertained, to require them to be returned unopened, except as provided by statute, or a specific penalty be paid for failure so to do.

It is further contended that section 961, Rev. Stat. U. S. protects against enforcement of a penalty of this kind. This section provides: "In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperformance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury." But if we are correct in holding that it was the intention of Congress to provide a specific penalty for failing to return the merchandise as required, it is not within the province of courts of equity to mitigate the harshness of penalties or forfeitures in such cases, for such relief would run directly counter to the statutory requirements. (Story, Eq. Jur. sec. 1326.) We think the Circuit Court was right in rendering judgment for double the value of the unreturned package.

The judgment of the Circuit Court of Appeals will be reversed and the judgment of the Circuit Court affirmed and the case remanded to the Circuit Court.

Mr. Justice BREWER took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.